No. 22,557

IN THE

United States Court of Appeals

For the Ninth Circuit

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, a corporation,
Appellant,

vs.

BERT SIMPSON,
Appellee.

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR APPELLEE

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IN THE

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American Casualty Company of Reading, Pennsylvania, a corporation,	*Appellant,*
vs.	
Bert Simpson,	*Appellee.*

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR APPELLEE

Appellee Bert Simpson lost his left arm in a hunting accident on July 21, 1964. He brought suit for accidental dismemberment as an insured under Master Insurance Policy VGA 18694-F issued by Appellant American Casualty Company to the City of San Francisco, his employer. It is undisputed that all premiums were paid, due notice was given and the occurrence was accidental. At the trial Appellant raised as the prime issue the question of whether Appellee was a "full-time Employee" on the date of the injury. The court, sitting without a jury, found that he was and entered judgment on the policy in Appellee's favor in the amount of $50,000 with interest.

Contrary to required appellate procedure, Appellant's incomplete statement of facts summarizes the evidence favorable to itself, omitting many damaging facts. Hence a more complete statement including evidence favorable to Appellee follows:

STATEMENT OF FACTS

Appellee, a Civil Service employee, worked as a bus driver for the Municipal Railway (operated by the City and County of San Francisco) from 1946 until he resigned in 1960 (RT 82, 147, 148, Exhibit 10, Exhibit 18). He was rehired in the same position in May, 1963 (RT 44, 82, 108, 115, Exhibits 10, 14). On May 13, 1964, he was granted 10 days personal leave to visit his mother who was "low sick" in Texas (RT 48, 60, 61, 86, Exhibit 7). While there he made at least three telephone calls on different days to George Lewis, his supervisor and superintendent of the Municipal Railway's Potrero Division, requesting extensions of time (RT 50, 51, 61, 63, 74, 87, 91, 93). He believed he was granted additional time by virtue of his two-week vacation leave (RT 50, 88, Exhibit 7). At no time did he intend to quit his job (RT 63-4, 87, 90) and he was reassured he would have a job upon his return (RT 89, 91). His employer's representatives were fully aware of his absence prior to the accident (RT 49, 69-71, 87, 164-165), and continued to carry him on the time rolls as on leave for personal reasons without pay until July 27, 1964, 6 days after his injury (RT 119). There was no rule providing for automatic termination of employment (RT 126). No doctor's certificate for reinstatement of

any sort was required when an employee was absent for personal reasons (RT 73). He was considered a good employee and his supervisor would have been happy to have him back (RT 45, 54). There was no evidence of any request that Appellee present himself for work at any time during his absence.

Appellee lost his arm in a shotgun hunting accident on July 21, 1964 (RT 80-82). On July 27, 1964, some time after being notified of the accident (RT 57), his supervisor, Lewis, took action to end the employment (RT 52, 53) based on Appellee's being on leave for a period in excess of two consecutive working weeks (RT 118, 121, Exhibits 12, 12a, 16). Mr. Carr, the appointing officer, terminated him on the same day (RT 113, 114, 120, Exhibits 12, 12a). The Civil Service Commission approved his termination on October 1, 1964 (RT 112).

Insurance premiums had been paid by payroll deductions and directly by Appellee (RT 41) up to August 15, 1964 (RT 26, 27, 28, 42, 161) to the Edwards Company (RT 41, Exhibit 4), the broker administering the policy for Appellant. The policy was applicable to "all full-time Employees & their spouse (sic)" (Item 5 of Exhibit 9). It provided coverage until "the first premium due date following the date on which the Insured Person ceases to be an employee of the Policyholder" (Part IV of Exhibit 9). It did not define "full-time Employees", nor state whether absence from the job, with or without leave, was a basis for denying coverage (Exhibit 9). Appellant's broker determined if employment existed or if

coverage should be cancelled based upon notification by letter from the Comptroller's office or from the insured himself (RT 34).

Civil Service Commission and Municipal Railway rules provided for termination of a limited tenure employee by the appointing officer upon good cause and subject to approval by the Civil Service Commission (RT 115-117, Exhibit 15). Civil Service Commission Rule 47 stated that

> "Appointing officers shall determine whether the absence of a limited tenure appointee is justified or whether the appointment shall be terminated. If the appointment is not terminated, the appointee shall be shown on the time roll as on personal leave without pay." (RT 118).

Miss Loebbing, secretary to the superintendent of the Potrero Division of the Municipal Railway (RT 66, 68), Mr. Harry Albert, Assistant General Manager of Personnel for the Civil Service Commission (RT 123) and Mr. Roger Ritchey, Personnel Officer for the Public Utilities Commission (RT 147) testified the total days absence which would result in termination varied with the particular employee and could depend on the merits of the case. If he returned the day after termination, it might have been put aside and the employee returned to work (RT 66). If he had been away from his job for a period of time, the custom and practice regarding termination was for management to call the division superintendent and have the employee terminated (RT 64-65). This is what was done in the case of Appellee (RT 66).

Every single witness, except Appellant's broker, testified that Appellee was not terminated or fired before July 27, 1964 (RT 45, 52, 53, 66, 111-113, 124, 152). Appellant's broker gave no direct testimony on termination but introduced records showing the insurance effective as of October 1, 1963, and cancelled as of August 1, 1964 (Exhibit 1) with premiums paid to August 15, 1964 (RT 27, Exhibit 4).

The court determined that on the date of loss of the lower portion of his left arm, Appellee "was an employee of the City and County of San Francisco as defined by the terms of the policy; and that plaintiff is entitled to coverage under the terms of the policy." (CT 56).

ARGUMENT

I

APPELLANT MUST SHOW THE TRIAL COURT WAS CLEARLY ERRONEOUS.

The sole task of this court is to determine if there was sufficient evidence supporting the finding and judgment. The burden rests upon the Appellant to convince the court there was not. In *Pacific Queen of Fisheries v. Symes,* 307 Fed. 2d 700 (CA 9th 1962) the court stated at page 706:

> "Secondly, it is not incumbent upon *appellees* to persuade this court that the District Court's findings are correct; on the contrary, the *appellants* must persuade this court that the District Court's findings of fact are, as specified by appellants, clearly erroneous. Third, this court must view the

evidence in the light most favorable to the party who prevailed below; such a party must be given the benefit of all inferences that may reasonably be drawn from the evidence. The findings of the Trial Court sitting without a jury must be accepted unless they are clearly erroneous; . . . ."

II

EMPLOYMENT WAS NOT TERMINATED UNTIL AFTER THE ACCIDENT.

The insurance contract contained no provision defining termination of employment, and therefore the issue of employment had to be decided in accordance with the employer's rules.

Premiums were paid, proper notice was given and the loss of Appellee's arm was accidental. There was no contract provision setting forth absence as an exclusion nor any definition of the phrase "full-time Employees". Accordingly, the court was required to look to the rules of the employer Municipal Railway and Civil Service Commission.

Simpson had been employed as a bus driver for over a year when the July 21, 1964 accident occurred. The first date having any possible effect upon the employee relationship was July 27, 1964. The record is replete with uncontradicted statements by all the representatives of Appellee's employer that he was not terminated before July 27, 1964. This date was arrived at in accordance with the usual custom and practice. Until then, Appellee had been carried on the time

rolls as an employee on leave for personal reasons. Appellee intended to return to work and believed he was eligible. He did not resign, as he did previously, and no evidence was presented indicating any attempt to abandon employment. Medical certificates were not required for an absence for personal reasons, and the employer had no rule of automatic termination. The first action was taken on July 27, 1964, 6 days after the accident, when Appellee's immediate supervisor initiated termination. This termination was not approved until October 1, 1964.

In *McGill v. City and County of San Francisco,* 231 CA 2d 35 (1964), the court held that approval of the Civil Service Commission is required before the services of a limited tenure employee are terminated. The manager of the Municipal Railway had recommended dismissal of a motorman in the Civil Service Commission. The Commission disapproved the termination, but the manager terminated the employment anyway. The employee sought a writ of mandate to compel his reinstatement. In granting the writ and reversing the lower court, the Appellate Court held that the motorman's employment could not be terminated without approval of the Civil Service Commission. They stated on page 38:

> "We conclude that the appointing officer may not terminate the employment of a limited tenure employee without the approval of the Civil Service Commission, . . ."

III

APPELLANT'S TESTS FOR EMPLOYMENT STATUS ARE INAPPLICABLE.

A. Availability of Employment.

Appellant asserts that availability for work and the right to return to work should be used in deciding if Appellee was an employee at the time of the accident. These tests were urged also to the trial court. The evidence was overwhelming that under the Municipal Railway rules Appellee was an employee at the time of injury, regardless of his availability for work or right to return, and the trial court found accordingly. If it is used as a test, Appellant can still reap no benefit from it. There is no evidentiary support for its argument that Appellee was entirely unavailable for work. The Municipal Railway made no request or hint that he should present himself for work at any time, although they were well aware of his absence. He testified he had no intentions of quitting and believed he was eligible to return to work. This belief was confirmed by the various telephone conversations with his supervisor and his failure to resign as he had done on a prior occasion.

Harlen v. Washington Nat'l Insurance Co., 388 Penn. 1088, 130 Atlantic 2d 140 (1957) now cited by Appellant, but not considered germane by it when cited by Appellee (CT 44), affirmed the determination that employment continued, even though the employee was not engaged at his given job for the full daily and weekly periods which his duties required and the death occurred one month after expiration of his leave. Appellant's cited case of *Bakenson v. The John*

Hancock Mutual Life Insurance Co., 222 Oregon 484, 353 P 2d 558 (1960), also affirmed the judgment for the employee even though he had worked as a fire watcher for only 18 days in the preceding 3 months and the contract required "an employee whose regular working schedule with one employer equals or exceeds 24 hours per week."

B. Right to Return to Work.

Appellee's employer carried him on the time rolls until July 27, 1964, did not institute termination until 6 days after the accident, and did not approve termination until over a month after the accident. If he had returned the day following termination it was even possible to have the termination set aside and for him to return to work (RT 66). Appellee's right to return to work is supported by previous court decisions. *Balff v. Public Welfare Department,* 151 CA 2d 784, 312 P 2d 360 (1957), now cited by Appellant but considered as lacking relevance when cited by Appellee (CT 43), also involved a Civil Service Commission employee. At page 788, the court stated:

> "The fact that a person is on leave from his 'employment' makes him no less an employee."

While on leave to attend school, Balff continued to be an employee and had to comply with the residency requirements. Balff remained an employee even though he was absent from work.

The previously cited case of *McGill v. City and County of San Francisco,* 231 CA 2d 35 (1964), clearly shows that the services of a limited tenure employee are not terminated until the termination has been approved by the Civil Service Commission.

Appellant has cited the case of *Pearson v. Equitable Life Assurance Society of the United States,* 194 SE 661. There, the employer had a rule that employment automatically terminated upon sentence of an employee to prison. This rule had been specifically brought to the decedent's attention upon a previous arrest. The employer's foreman was notified on the day of sentencing and, as stated at page 662:

> "Thereupon the name of the deceased was erased from the roll of employees of the said tobacco company."

At page 664, the court notes that the deceased employee having, by his own act, terminated his status as an employee and

> ". . . *the employer having recognized, accepted and acted upon said termination,* the defendant is in no way liable to the plaintiff upon this specific suit." (Emphasis added).

In the case now before the court, there was no rule of automatic termination, the first acts of the employer were on July 27, 1964 and the final acts of termination took place on October 1, 1964. All of this was subsequent to the injury, and accordingly Appellee continued to be an employee at the time of the injury.

Appellant's lack of reference to any specific date or action by the employer ending employment imposes a horrible game of guessing and confusion upon Municipal Railway employees. Appellant would require omniscience in determining when and if employment had been terminated by neglect, design or mistake.

IV

BY ITS TERMS, THE POLICY WAS IN EFFECT WHEN THE ACCIDENT OCCURRED.

Regardless of whether Appellee was employed at the time of the accident, he was covered under the terms of the policy. It provided:

> "the individual coverage with respect to any Insured Person shall immediately terminate;
>
> a. On the date of termination of this Policy by either the Policyholder or the Company as provided in the Termination Part VI (the Company will return the pro-rated portion of any premium contribution unearned as a result of such termination); or,
>
> b. On the first premium date *following* the date on which an Insured Person ceases to be an employee of the Policyholder . . . (Part IV of Exhibit 9)" (emphasis added).

All premiums were paid to August 15, 1964 (RT 27, Exhibit 4).

Additionally, the policy required return of any unearned premium as a result of termination. After the accident, premiums were returned and the policy was cancelled as of August 1, 1964 (RT 31, Exhibit 1). By their own acts Appellants thus admit coverage when the July accident occurred. *Quong Tue Sing v. Anglo-Nevada Assurance Company,* 86 C 566, 572.

V

CONCLUSION

The loss of Appellee's arm occurred on July 21, 1964. All representatives of his employer testified that termination did not take place until July 27, 1964, and it was not approved until October 1, 1964. Premiums were paid, notice was given and the injury was accidental. The District Court found Appellee entitled to the promised and paid for benefits. It is respectfully submitted that the judgment in favor of Appellee Simpson and against Appellant American Casualty Company should be affirmed.

Dated, San Francisco, California,
October 28, 1968.

HOBERG, FINGER, BROWN & ABRAMSON,
Attorneys for Appellee.